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Nos. 81-1077 and 81-1088

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

FRANK MARSH, et al.,

Petitioners,

—v.—

ERNEST CHAMBERS,

Respondent.

ON PETITION FOR A WRIT OF *CERTIORARI*
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Nebraska legislature, which has retained the same chaplain for 16 years to open each session with a prayer, which has compensated this chaplain by a monthly salary for his prayers, and which has reprinted at state expense the chaplain's prayers in a Prayers Book for distribution to the public, has thereby violated the Establishment Clause of the First Amendment.
2. Whether the Tenth Amendment, principles of federalism, or absolute immunity barred a federal district court from adjudicating this First Amendment lawsuit and granting appropriate relief against defendants, who are the Executive Board of the Nebraska Unicameral, its chaplain, and the state treasurer.

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STATEMENT OF THE CASE

Petitioners' statement of the case omits several important facts contained in the record. Respondent Ernest Chambers is a State Senator in Nebraska's Unicameral Legislature. He has held this office since 1970. During the entire time that Mr. Chambers has been a member of the Unicameral, a prayer has been delivered each morning on the floor of the Legislature by Reverend Robert E. Palmer, a Presbyterian minister. Reverend Palmer has been employed as the Unicameral's Chaplain since 1965, and is paid $320 a month from the state treasury for his services. In 1975, 1978 and again in 1979, the Unicameral ordered that the Reverend's prayers be reprinted at state expense in a Prayers Book for distribution to the public.

This lawsuit was filed on December 12, 1979. It alleged that the Unicameral's

prayer practice--the institutionalization of daily prayer, the compensation of the Chaplain, and the reprinting of the Chaplain's prayers--violated the Establishment Clause of the First Amendment.

A trial on the merits was held in the district court on December 1, 1980. The following evidence, which is nowhere mentioned in the Petition for Certiorari, was adduced at trial.

1. All witnesses agreed that the continuous retention of a Christian clergyman as legislative chaplain gives, or could give, the impression that Christianity is the "official" or "normal" religion of the State of Nebraska. [Tr. at 20, 43-44, 107]. Reverend Palmer admitted "it could be perceived as such." [Tr. at 107].

2. All witnesses agreed that the Unicameral probably would never appoint

a non-Christian to be its chaplain. [Tr. at 15-16, 125-26]. Defendant Frank Lewis, a member of the Unicameral's Executive Board, stated that most legislators would object if a non-Christian were appointed chaplain. [Tr. at 126-126].

3. All witnesses agreed that Reverend Palmer's prayers could offend those people who did not share his particular religious beliefs. [Tr. at 12, 20-36, 44-46, 92, 105, 125-126]. Reverend Palmer admitted that several Jewish Senators had been offended by the chaplain's prayers and he also knew that Senator Chambers had been offended by them. [Tr. at 90, 92, 105].

REASONS FOR DENYING THE WRIT

A. The Case Does Not Merit Review

There is nothing in the decision below which merits further review. Its narrow holding will have little applica-

tion, if any, to other chaplaincy programs.

The Eighth Circuit's decision is predicated on the facts before it. Indeed, the only broad issue presented in this case was presented by the Respondent, Mr. Chambers, and this issue was decided against him. Mr. Chambers argued below that legislative prayer is unconstitutional per se. The Court of Appeals rejected that argument, citing Bogen v. Doty, 598 F.2d 1110 (8th Cir. 1979).

In Bogen, the court had ruled that legislative prayer is not unconstitutional per se and that each prayer program must be reviewed under its own facts. Adhering to Bogen, the court below reviewed the Unicameral's prayer program and found it to be unconstitutional. It reached this conclusion due to the presence of three factors: the Unicameral's program employed the same

chaplain for 16 years, it used state funds to pay this chaplain, and it used state funds to reprint its chaplain's prayers.

Thus, far from making novel or broad pronouncements, the Eighth Circuit expressly limited its holding to the unique facts of this case. Chambers v. Marsh, 675 F.2d 228, 235 (8th Cir. 1982).

The opinion below is so tightly drawn that the petitioners are forced to raise Establishment Clause issues entirely different from the one decided by the Court of Appeals--issues that the court had no occasion to consider. See generally Pet. at 21. Petitioners concede that the Court of Appeals "tailor[ed] its opinion specifically to the Nebraska practice", id., but seek this Court's review because in doing so, the court "left several critical questions certain to arise elsewhere unresolved." Id., emphasis added.

It is these "elsewhere" questions which the Petition seeks to raise on appeal. To illustrate its point, the Petition states that the decision below "leaves unresolved ... the question of what analysis is proper when only one element is questioned, for example, only the compensation of a legislative chaplain." Id. The short answer to petitioners' argument in this respect is quite simple: these questions were left unresolved because they were not presented, and because their resolution was unnecessary to disposition of this case. Any resolution of these questions in the context of this case would be merely an advisory opinion.

There is only one issue on appeal regarding the merits of this case. The Court of Appeals concluded that the prolonged retention of a single chaplain to offer legislative prayer, when com-

bined with the state's compensation of this person and the reprinting of his prayers, violates the Establishment Clause. The correctness of this conclusion is the only Establishment Clause issue which this case presents. Yet the resolution of this question has so little application to any other chaplaincy program that the decision below does not merit this Court's attention.

The limited nature of the decision below is revealed by the fact that, under its rationale, the Unicameral may continue to offer daily legislative prayer. What it may not do is to conduct a prayer program which combines the three elements that were initially part of its program: a chaplain retained for a prolonged period of time, compensated for his prayers, and whose prayers are reprinted at state expense for public distribution.

The issues which petitioners would like to have resolved--such as what analysis might have been proper if only the chaplain's compensation had been challenged--must await a case which raises those issues. This one does not.

B. The Decision Below Does Not Conflict With Any Federal Court Decision.

The decision below does not conflict with any federal court decision. To the contrary, it is completely consistent with a host of cases enjoining state officials from engaging in various religious activities, especially where state expenditures of funds are involved. See, e.g., Stone v. Graham, 449 U.S. 39 (1980)(posting the Ten Commandments on classroom walls); Gilfillan v. City of Philadelphia, 637 F.2d 924 (3rd Cir. 1980), cert. denied, 451 U.S. 987 (1981)

(using public funds to construct a platform for the Pope's speech); Hall v. Bradshaw, 630 F.2d 1018 (4th Cir. 1980), cert. denied, 450 U.S. 965 (1981)(printing a prayer on state highway maps); Voswinkel v. City of Charlotte, 495 F. Supp. 588 (W.D.N.C. 1980)(hiring a police department chaplain).

Although petitioners urge this Court's review on the basis of an asserted conflict with Colo v. Treasurer and Receiver General, 392 N.E. 2d 1195 (Mass. 1979), see Pet. at 18, the Supreme Court of Massachusetts was not faced by all three factors relied on by the Eighth Circuit. There was no indication in Colo that the legislature had paid for the printing and public distribution of the legislative chaplain's prayers. In any event, there is no pressing need for this Court to review this conflict in the absence of any indication that

other states are following the Massachusetts decision, which is contrary to this Court's longstanding Establishment Clause analysis and inexplicable in its focus not on the payment for religion but on legislative prayer itself.[1/]

C. The Decision Below Is Eminently Correct.

The decision below is a careful application of settled Establishment Clause law. It recognizes that the line of separation between church and state "'is a blurred, indistinct and variable

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1/ Reference to legislative prayer practices in some opinions in this Court's Establishment Clause cases (Pet. at 18) hardly suffices to create a conflict worthy of certiorari, especially since there is no reason to suppose that those dicta addressed a prayer program and public expenditures analogous to Nebraska's.

barrier depending on all the circumstances of a particular relationship.' Lemon v. Kurtzman, 403 U.S. 602, 614 (1971)." Chambers v. Marsh, supra, 675 F.2d at 233-234 (emphasis supplied by the Court of Appeals). Upon the review mandated by Lemon, the Eighth Circuit has correctly found that the particular relationship between the Nebraska Legislature and Nebraska's prayer program has fallen into the "quagmire" of state establishment of religion warned against in Bogen v. Doty, supra, 598 F.2d at 1114.

The court below did not question the right of the Legislature to offer prayers. It merely held that the manner in which the Legislature was exercising this option crossed the constitutional barrier:

> In our view, Nebraska has fallen into that quagmire with its legislative prayer practice. For sixteen years, the Nebraska legislature has selected and paid one minister representing one denomination, to open each legislative session with prayer. The state has compensated the minister for offering such prayers. It has published his prayers for distribution to members and nonmembers of the legislature. Such a practice violates all three elements of the constitutional test applicable here.

Chambers, 675 F.2d at 234.[2/]

2/ The Court of Appeals found that the Unicameral's prayer program violated all three elements of the purpose-effect-entanglement test. Although petitioners claim that there is no evidence in the record to support the court's conclusions, Pet. at 23, 24, the record is replete with such evidence. For example, Reverend Palmer admitted during trial that he views himself as an "instrument of the Divine" whose purpose it is to help legislators realize that they, too, are "instruments of the Divine." Tr. at 100-101. The Reverend conceded that all of his prayers are consistent with his religious persuasion, all invoke God, and half are expressly directed to Jesus Christ. [Tr. at 40-41, 91]. These prayers seek to bring legislators closer to God. [Palmer Dep. at 46]. Thus, (footnote continued on following page)

D. Neither The Tenth Amendment Nor Any Principle Of Federalism Immunizes Petitioners From This First Amendment Lawsuit.

Petitioners claim that their decision to retain a chaplain for the purpose of offering daily prayer, and their decision

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(footnote continued from preceding page) there is an admitted and clearly visible religious purpose to these prayers. As the district court concluded,"[t]o say that the prayers have no religious purpose would reach incredibility; they do indeed have a religious purpose..." Chambers v. Marsh, 504 F. Supp. 585, 589 (D. Neb. 1980).

Similarly, the court's conclusion that the Unicameral's prayer program had an impermissible religious effect is also amply supported by the record. Every witness at trial, including the two defendants who testified, agreed that the Unicameral's continuous retention of a Christian chaplain could be perceived as placing the State's imprimatur on the Christian religion. [Tr. at 20, 43-44, 107]. Reverend Palmer admitted that some legislators have been offended on religious grounds by the denominational preference reflected in these prayers. [Tr. at 90, 92, 105]. Respondent Chambers testified to his aversion at great length. [Tr. at 12, 20-36, 44-46]. This statement illustrates once again that an impermissible religious effect may be harmful to religion, and why religion is too important to be left in the hands of civil magistrates.

to use public funds to finance their prayer program, is a "purely internal operation" of the Unicameral which federal courts may not scrutinize. Pet. for Cert. at 11. If this is true, then under the banner of "our federalism," petitioners can create a legislative system completely antagonistic to the First Amendment. They can decide, for example, that the Finance Committee can only be staffed by Presbyterians and that only Muslims can address the Unicameral from now on.

1. The Tenth Amendment

Petitioners invite the Court to create "a limited extension of Tenth Amendment restraint [to] civil rights lawsuits." Pet. at 13. But the Tenth Amendment can offer petitioners no immunity from this First Amendment lawsuit. Their claim that it does is refuted by the very

lanuage of the Tenth Amendment, which states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." [Emphasis added].

If the Unicameral's prayer program violates the First Amendment, as plaintiff alleged, then the Tenth Amendment cannot save it because that Amendment expressly exempts itself from applying in such situations. The Tenth Amendment does not reserve to the States the power to violate the First Amendment.[3/] The change which

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3/ As the Court of Appeals stated, "if we adopted the defendants' position, the Tenth Amendment would shield state action from the entire Bill of Rights." Chambers, 675 F.2d at 231 n.1. Accord, Marshall v. City of Sheboygan, 577 F.2d 1, 6 (7th Cir. 1978); Arrett v. Grisell, 567 F.2d 1267 (4th Cir. 1977); State of New Hampshire v. Marshall, 616 F.2d 240 (1st Cir. 1980); United States v. City of Parma, Ohio, 661 F.2d 562 (6th Cir. 1981).

petitioners seek can be accomplished only one way--by constitutional amendment--and not by judicial decree.

2. Principles of federalism

The short answer to petitioners' federalism argument is that federalism is not a one-way street. This lawsuit raises a First Amendment claim. It has always been the special province of the federal courts to adjudicate claims of this nature. Only in limited circumstances can federal courts avoid deciding First Amendment claims, and those circumstances are not present here.

The abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), is inapplicable here because there have never been any state proceedings relative to the present action. See Zablocki v. Redhail, 434 U.S. 374, 380 n.5 (1978). Cf. Patsy v. Board of Regents of the State of

Florida, ____ U.S. ____ 50 U.S.L.W. 4731 (June 21, 1982). So, too, is the limited protection offered by Rizzo v. Goode, 423 U.S. 362 (1976). This lawsuit challenges a continuous practice in which defendants directly participated under official policy. Rizzo therefore has no application in this context. Cf. Doran v. Salem Inn, Inc., 422 U.S. 922, 930 (1975).

This lawsuit is a "classic" § 1983 action in which state officials are accused of violating the First Amendment. "The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights ..." Mitchum v. Foster, 407 U.S. 225, 242 (1972). The lower courts rejected petitioners' federalism arguments for good reason: respondent is entitled to a federal adjudication of his First Amendment claims.

3. Legislative immunity

Petitioners claim to possess a form of legislative immunity which this Court rejected a century ago in Kilbourn v. Thompson, 103 U.S. 168 (1881). Legislative immunity protects only those activities "related to the functioning of the legislative process." United States v. Johnson, 383 U.S. 169, 172 (1966). Reverend Palmer's prayers are not "related" to the legislative process in that sense. As this Court explained in United States v. Brewster, 408 U.S. 501 (1972), the above phrase

> did not in any sense imply as a corollary that everything that "related" to the office of a Member was shielded by the [Speech and Debate] Clause. Quite the contrary, in Johnson we held, citing Kilbourn v. Thompson, supra, that only acts generally done in the course of the process of enacting legislation were protected.

Id., 408 U.S. at 513-514.

It does petitioners no good to argue that the chaplain's prayers have become a habitual part of morning activities. Pet. at 16-17. This is not the test. "That Senators generally perform certain acts in their official capacity as Senators does not necessarily make all such acts legislative in nature .... Legislative acts are not all-encompassing. The heart of the Clause is speech or debate in either House." Gravel v. United States, 408 U.S. 606 (1972). The chaplain's prayers are not speech or debate. They are not related to the enactment of legislation. They form no part "of the deliberative and communicative processes by which Members participate in committee and house proceedings..." Id., 408 U.S. at 625.

It has always been proper for the judiciary "to consider whether [legislative] proceedings are in conformity with

the Constitution and laws, because, living under a written constitution, no branch or department of the government is supreme." Kilbourn, supra, 103 U.S. at 199. Petitioners' arguments are foreclosed by Kilbourn and by a host of other cases, including Gravel, Brewster, Johnson, and Powell v. McCormack, 395 U.S. 486 (1969), and would require that Bond v. Floyd, 385 U.S. 116 (1966) be overruled.

CONCLUSION

For the foregoing reasons, the Petition for Certiorari should be denied.

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